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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
KMC Petition for Declaratory Ruling	)	CC Docket No. 99-142
To Prohibit Termination Penalties on	)	
Incumbent Local Exchange Carrier	)	
Tarrifs and Contracts	)	

OPPOSITION OF BELL ATLANTIC[1]

Term purchase agreements are pro-competitive and pro-customer. They result in lower prices based on market-place competition. Indeed, the Commission has recognized that such arrangements provide important benefits, and it has upheld termination liability provisions that make such discounted term arrangements possible. KMC's petition would limit consumer choice by having the Commission declare unlawful all such provisions in any incumbent local exchange carrier ("ILEC") contract or tariff.

In addition to being bad policy, the KMC petition includes the unprecedented demand that the Commission completely usurp local regulatory authority for basic tariff review of local services. The Commission has made clear that the Act requires that any request for preemption must be limited and specific. The KMC petition is neither. While seeking to overturn multiple tariff offerings in every state, it does not specify what those tariff offerings are, why the specific offerings are deficient, or what should replace them.

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

While the petition is long on rhetorical complaints, it is devoid of the specifics necessary to support a preemption claim. As a matter of law and policy the Commission should reject the KMC petition.

I. Termination Liabilities Are Pro-Competitive And Provide Important Customer Benefits

While KMC claims that its petition would eliminate "unreasonable" and "excessive" termination penalties, in fact the petition asks the FCC to preemptively eliminate *all* termination liabilities in ILEC contracts and tariffs without any limit on termination penalties in contracts of competing carriers like KMC. Petition at 3. Indeed, despite the rhetoric in its petition, KMC is winning customers with its own multi-year term plan commitments. *See, e.g.*, Communications Daily, "Telephony" (May 6, 1999) (reporting on a 5 year agreement by KMC Telecom to provide MCI WorldCom with high-volume bandwidth to local customers in 11 states).

Termination penalties are a necessary adjunct to term discount plans. Term discounts are pro-competitive price reductions that benefit both service providers and customers. The provider benefits because of the certainty that it will receive revenues during the period of the term plan and have an opportunity to recover any up-front costs it incurs. This, in turn, allows it to make more reasonable investment decisions. Reduction of churn also serves to lower costs. Customers benefit because the term plans provide carriers with a measure of certainty that would allow them to charge lower prices than they otherwise could, and allow customers to secure a reduced price for services. Because many telecommunications services have substantial fixed costs, carriers are able to lower prices even further for term plans that spread recovery of that fixed cost out over a longer period. Moreover, because the term plan remains as an alternative to standard month-to-month service, such plans increase customer choice.[2]

Term discount plans would not be possible absent termination liability provisions. As a business matter, the benefits of a longer-term contract would be illusory if customers were free to exit from their commitment without any liability. Without some reasonable assurance that they will be able to recover their up-front costs and have opportunities to market additional services, carriers would have little incentive to offer discounts from standard tariff rates and to compete as aggressively for the customer's business. Moreover, as a legal matter, a term arrangement without any early termination liability could be viewed as discriminatory relative to standard tariff offerings. If certain customers were to receive a price discount based on a term of service, and were later to break that commitment without any penalty, their service commitment would be no different from the month-to-month subscriber who pays standard tariff rates. Absent an obligation to pay termination liabilities, such an arrangement could be viewed as undue discrimination.

The Commission has specifically recognized that termination liabilities are not inherently unreasonable conditions or limitations on competition. *Application of BellSouth, et al., Pursuant to Section 271 of the Communications Act of 1934, As Amended, To Provide In-Region, InterLATA Services In South Carolina*, 13 FCC Rcd

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[2] That choice includes a decision to accept the termination liability provision. All Bell Atlantic termination liability provisions are fully disclosed prior to service agreement. Because customers have a choice -- either to purchase a standard month-to-month tariff offering or to purchase service from another carrier altogether – a decision to purchase a term plan includes a determination that the termination liability provision is not unreasonable.

539, ¶ 222 (1997) ("*South Carolina Order*"). In fact, most carriers, including Bell Atlantic, have term plans in their interstate tariffs and the Commission has specifically accepted some specific provisions as reasonable. For example, in the context of interstate special access services, the FCC determined that local exchange carriers may reasonably collect termination liabilities that represent "the difference between (1) the amount the customer has already paid and (2) any additional charges that the customer would have paid for service if the customer had originally taken a shorter term arrangement corresponding to the term actually used, plus interest to be calculated at the IRS rate for tax refunds, compounded daily." *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341 (1993) at ¶ 40 (footnotes omitted). Not surprisingly, similar provisions have been accepted by state regulators. For example, even during a "fresh look" in New Hampshire, the Commission there required that "[a] customer choosing to terminate its long-term contract with Bell Atlantic will be subject to termination charges in an amount equal to the price the customer would have paid for service if the customer had taken a term offering for the length of time the contract has actually run, minus the amount the customer has actually paid" plus "interest on the difference." Order No. 22,798 at 25-26, DR 96-240, (NH PUC, Dec. 8, 1997).

While the Commission did order a reopening of term contracts as a result of its expanded interconnection policy, that "fresh-look" was very limited and did not apply to any contract entered into since September, 1992. *Expanded Interconnection*, 8 FCC Rcd 7341, ¶ 35. KMC's petition, in contrast, has no time limit and seeks to reopen contracts that were entered into well after it and other competitors offered customers competitive alternatives. Moreover, even when the Commission did order a limited "fresh-look," it did not eliminate all termination liabilities. In fact, the Commission found that the penalties it accepted would still allow customers to benefit from the increased competition generated by its then new interconnection policies. *Id.* at ¶ 41. The Commission determined that such penalties would "reasonably balance the interests of both the [local exchange carriers] and their customers." *Id.*

II. The Petition Fails To Present A Case For Preemption

In order for the Commission to preempt state authority under Section 253 of the Act, the Commission requires a factual demonstration detailing what state provision preemption is sought for and why that specific provision prohibits petitioner from offering a specific service. KMC's generalized petition cannot meet this standard, and does not even attempt to offer the required factual demonstration.

KMC makes no effort to isolate only those termination liability provisions it claims prohibit competition.[3] Indeed, because competition is enhanced, not impeded, by the price discounting facilitated by terminating liability provisions, such a task would be impossible. Instead, KMC argues that *all* terminating liability provisions in ILEC contracts and tariffs should be held unlawful, regardless of their terms.

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[3] While KMC does cite some individual tariff provisions, it does not limit its petition to preemption of specific provisions. Moreover, many of its citations do not specify the termination liability provisions, but only the length of the term contract, as if that fact alone provided some justification for preemption. Moreover, even in the few instances where the petition does cite a specific termination liability provision, there is no showing that such a provision prohibits competition. For example, the only provision cited for a Bell Atlantic service is for Bell-Atlantic Virginia's Digital Data Service. Petition at 6. But the term discounts for that service are so steep – up to one third off of the month-to-month rates -- that depending on when a customer terminates, it could be better off buying the term rate and terminating early than if it had purchased the service month-to-month and incurred no termination penalty. Such a provision can hardly be considered a complete block to KMC's ability to compete.

Even if KMC could demonstrate that some specific penalties prohibits competition[4] – something it does not even attempt to do in its petition – its proposed all-encompassing prohibition is completely inconsistent with the Commission's interpretation of its preemption power under section 253. The Commission has made clear that it must reject requests for "wholesale preemption" and that a successful petition must include a "detailed explanation of how a particular state's [requirements] differ from those of the Commission." *Implementation of the Subscriber Carrier Selection Changes*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 94-129, FCC 98-334, ¶ 89 (Rel. Dec. 23, 1998). More particularly, the Commission has held that termination liabilities must be evaluated in light of "evidence in the record concerning the exact nature of the cancellation or transfer penalties." *South Carolina Order*, ¶ 222. KMC does not cite a single state evaluation of a termination liability,[5] but instead demands an across the board invalidation of *all* such provisions.

This need for specificity is not just a convenience, it is a necessity under the statute. The Commission's ability to preempt state rulings under Section 253 must be

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[4] In fact, the underlying services have been found to be competitive by state regulators thereby undermining any claim that competition for these services is prohibited. *See, e.g., The Chesapeake and Potomac Telephone Company of Maryland's Proposal for a Regulatory Reform Trial*, Case No. 8106, Order No. 68115, (MD PUC June 30, 1988), finding sufficient competition to streamline regulation for certain services including centrex and high capacity private line services.

[5] KMC has challenged termination liabilities at the state level in at least one Bell Atlantic jurisdiction, but that case has just been briefed, and has not been decided. *See KMC v. Bell Atlantic-Virginia, Inc.*, Virginia State Corporation Commission Case No. PUC980175, Preliminary Order (Dec. 16, 1998). Moreover even in the state case, KMC does not object to the specific terms of a state termination liability provision, but rather to all termination liability provisions within the state.

only "to the extent necessary." 47 U.S.C. § 253(d). In crafting procedures for section 253 petitions, the Commission recognized that this provision requires the Commission to preserve "the vital role of state and local authorities in advancing the interests of their citizens." *Suggested Guidelines For Petitions For Ruling Under Section 253 of the Communication Act*, 13 FCC Rcd 22970 (1998) ("*Guidelines For Petitions*"). In order to allow the Commission to tailor as narrow a remedy as possible, the Commission required that any petition establish a detailed factual record. Such a record is completely absent here.

For example the Commission requires identification and a copy of the "statute regulation, ordinance or legal requirement that is being challenged." Here, other than a handful of tariff cites, the petition fails to specifically identify what it seeks to overturn. Moreover, the petition fails to cite any state decisions addressing the issue at all. This is not surprising, given that KMC's arguments cannot withstand detailed scrutiny. For example, the Pennsylvania Commission, in upholding one local termination provision, rejected the same type of arguments that KMC makes here:

> "Any competitor . . .remains free to construct an alternative tariff offering responsive to Bell's and which, if necessary, includes compensation for any loss a customer might incur through termination of Bell's service. The fact that a competitor's cost might increase in a competitive market does not, in our view, rise to the level of anti-competitive advantage that must be rejected by the Commission."

AT&T v. Bell Atlantic-Pennsylvania, Docket No. R-00953394C0002-0004, Opinion and Order at 14 (PA PUC July 9, 1997).

The FCC also requires a specific recitation of the service that petitioner claims it cannot provide due to a state restriction. *Guidelines For Petitions*, Section B. KMC is not prevented from offering any service. Regardless, the petition does not even attempt to identify the specific services where there are termination liabilities that KMC claims prevent it from competing.

The Commission also requires petitioners to explain whether the legal requirement they seek to overturn categorically bans provision of telecommunications service. *Id.* Of course KMC's faces no such ban, and its petition is silent on the question.

III. The Relief Sought In The Petition Requires Impermissible Retroactive Ratemaking

Even if the petition met the standards under Section 253, which it does not, the Commission could only grant relief on a prospective basis, *i.e.*, it could only impose changes on new agreements, not on preexisting agreements.

As the Supreme Court has made clear, it is a cardinal principal of ratemaking that a regulatory agency may not set rates retroactively. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). An action that "impose[s] new duties with respect to transactions already completed" is impermissibly retroactive. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). As a result, where the Commission applies a new requirement, it must "apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." *See RKO General Inc. v. FCC*, 670 F.2d 215, 224 (D.C. Cir. 1981) (internal quotes omitted).

Here, Bell Atlantic reasonably relied on state approval of termination liabilities in entering into term discounts. Were the Commission to override those decisions, it could only do so for new contracts on a going-forward basis.[6]

Conclusion

The Commission should deny the KMC petition.

Respectfully submitted,

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[6] Where the Commission has applied "fresh-look" requirements in other contexts, it has relied on its authority to find that current rates are unreasonable under section 201 through 205 of the Act. *See, e.g., Expanded Interconnection*, 8 FCC Rcd at 7348. Regardless of whether that justification sufficiently addresses retroactive ratemaking concerns there, those provisions relate only to *interstate* services and have no applicability here where the relief seeks abrogation of term agreements for *intrastate* services.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 1999, copies of the foregoing "Opposition of Bell Atlantic" were sent by first class mail, postage prepaid, to the parties on the attached list.

Steven E. McPherson

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* Via hand delivery.

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